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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 184

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLANTS,

vs.

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLEES.

No. 185

LEE OPTICAL OF OKLAHOMA, INC., A CORPORATION; ELLIS CARP, DOING BUSINESS AS DOUGLAS OPTICAL; AND ORAN RIPS, APPELLANTS,

vs.

MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA; GRANVILLE SCANLAND, COUNTY ATTORNEY OF OKLAHOMA COUNTY, OKLAHOMA; ROBERT L. WHEELER, COUNTY ATTORNEY OF TULSA COUNTY, OKLAHOMA, ET AL, APPELLEES.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF AMICUS CURIAE
STATE OF KANSAS, ON THE RELATION OF HAROLD R. FATZER, ATTORNEY GENERAL.

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INDEX.

	Page
Opinions Below	1
Question Presented	2
Statutes Involved	2
Interests of Amicus Curiae	4
Statement	5
Summary of Argument	10
Argument:	
I. Purpose of Law is to Place Visual Care of the Public Under Licensed and Qualified Professional Persons	13
II. Visual Care of Public is Within Police Power and Constitutionality of Statute is Presumed Unless Statute is Clearly Arbitrary and Capricious	18
III. The Evidence Shows Sufficient and Substantial Reasons for Enactment of Section 2 of House Bill No. 953	23
Conclusion	28

CITATIONS.

Cases. Page

Abelson's vs. New Jersey State Board of Optometrists, 5 N. J. 412, 75 A. 2d 867, 22 ALR 2d 929... 19

Collins vs. Texas, 223 U. S. 288, 297, 56 L. ed. 439, 445 22

Graves vs. Minnesota, 272 U. S. 425, 428, 71 L. ed. 331, 335, 47 Sup. Ct. Rep. 122..... 26

McNaughton vs. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 Sup. Ct. Rep. 178..... 19

Roschen vs. Ward, 279 U. S. 337, 73 L. ed. 722, 49 Sup. Ct. Rep. 336.....19, 27

Sproles vs. Binford, 286 U. S. 374, 388, 389, 76 L. ed. 1167, 1179, 52 Sup. Ct. Rep. 581..... .26

Williams vs. Baltimore, 289 U. S. 36, 41, 77 L. ed. 1015, 1021, 53 Sup. Ct. Rep. 431.....18, 26

Oklahoma Statutes.

Chapter 11, Title 59, Oklahoma Statutes 1951 14

Chapter 13, Title 59, Oklahoma Statutes 1951..... 14

Chapter 24, Title 59, Oklahoma Statutes 1953 Supp.; 59 Okl. St. Ann. Sections 941-947..... 2

Section 1 of House Bill No. 953 (59 O. S. Supp. 1953, Section 941; 59 Okl. St. Ann. Section 941)..... 15

Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) 3, 4, 6, 7, 10, 11, 13, 16, 17

Kansas Statutes.

General Statutes of Kansas, 1949, 65-1504 (b)..... 4

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OPINION BELOW.

The opinion (R. 36) and partial dissent thereto (R. 62) of the United States District Court for the Western District of Oklahoma is reported at 120 F. Supp. 128.

QUESTION PRESENTED.

The questions presented in Appeal No. 184 are whether certain provisions of the Oklahoma Statutes relating to visual care are unconstitutional and void under the Constitution of the United States. Although these appeals involve the constitutionality and validity of several and various provisions and sections of the Oklahoma statute, this brief of the State of Kansas as amicus curiae is confined and limited to the question of the constitutionality of only one section of the Oklahoma statute and to only that portion of the District Court judgment and decree declaring that section unconstitutional and void.

The question presented by this amicus curiae brief is whether that portion of the Oklahoma statute is unconstitutional and void which makes it unlawful for any person not a licensed optometrist or ophthamologist to fit, adjust, adapt or to in any manner apply lenses, frames, prisms or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction or which are intended to aid human vision, except upon prescriptive authority of a licensed physician or optometrist.

STATUTES INVOLVED.

The statutes of the State of Oklahoma involved were enacted as House Bill No. 953 of the Twenty-fourth (1953) Oklahoma Legislature (Chapter 24, Title 59, Oklahoma Statutes 1953 Supplement; 59 Okl. St. Ann.

Sections 941-947). Although several sections of said Oklahoma statute are involved in these appeals, this amicus curiae brief is solely concerned with the provisions of Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) which provides:

> "It shall be unlawful for any person, firm, corporation, company, or partnership not licensed under the provisions of Chapter 11 or Chapter 13 of Title 59, Oklahoma Statutes 1951, to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person, or to duplicate or attempt to duplicate, or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted, or adjusted for visual correction, or which are intended to aid human vision or to give any treatment or training designed to aid human vision, or to represent or hold himself out to the public as being qualified to do any of the acts listed in this Section, except that persons licensed under the provisions of Chapters 11 or 13 of Title 59, Oklahoma Statutes 1951 may in a written prescription, or its duplicate, authorize any optical supplier to interpret such prescription, and who in accordance therewith may measure, adapt, fit, prepare, dispense, or adjust such lenses, spectacles, eye glasses, prisms, tinted lenses, frames or appurtenances thereto, to the human face for the aid or correction of visual or ocular anomalies of the human eye; and may continue to do the said acts on the aforesaid written prescription, or its duplicate, provided, however, that the physician or optometrist writing such prescription shall remain responsible for the full effect of the appliances so furnished by such other person. Provided that this Section shall not prevent a qualified person from making repairs to eye glasses."

INTEREST OF AMICUS CURIAE.

The State of Kansas, by and on the relation of its Attorney General, enters its appearance in Appeal No. 184 and files its brief as amicus curiae under Rule 42 by reason of its great interest in the constitutionality and validity of the Oklahoma statutes involved, particularly the provisions of Section 2 of said House Bill No. 953 quoted above. The legislature of the State of Kansas has previously enacted statutes concerning visual care. General Statutes of Kansas 1949, 65-1504b provides:

> "It shall be unlawful for any person to dispense an ophthalmic lense or lenses without first having obtained a prescription or order therefor from a duly licensed optometrist, or other person legally permitted to test eyes and fit glasses."

The provisions of the above cited Kansas statute make it unlawful to dispense ophthalmic lenses without a prescription or order from a duly licensed physician or optometrist. Although differing in wording and language, the Kansas statute is similar in meaning and effect to the Oklahoma statute (Section 2 of House Bill No. 953). It is not the contention of the State of Kansas that the Kansas statute includes all the effect and meaning of the Oklahoma statute, but only such meaning and effect as to render the statutes of the two states similar. The judgment and decree of the Oklahoma District Court declaring the Oklahoma statute unconstitutional and void therefore concerns and interests the State of Kansas.

At the present time there is litigation pending in various courts of the State of Kansas involving the constitutionality of the Kansas statute, and in which litigation the Oklahoma District Court decision is being cited to the Kansas Courts as authority. The decision of this Supreme Court may influence the outcome of litigation pending in Kansas courts.

The brief filed herein as amicus curiae by the State of Kansas and sponsored by its Attorney General is filed under the provisions of Section 4, Rule 42, Revised Rules of the Supreme Court of the United States.

STATEMENT.

The Oklahoma statute was enacted as House Bill No. 953 in the 1953 session of the Legislature of the State of Oklahoma. This law was approved by the Governor of Oklahoma on June 20, 1953, and by its terms became effective on September 5, 1953.

On September 2, 1953, and just prior to the Effective date of said House Bill No. 953, the plaintiffs below filed a civil action in the United States District Court for the Western District of Oklahoma, asking said court to enter a declaratory judgment holding said House Bill No. 953 unconstitutional and void and to enter judgment enjoining the Attorney General and county attorneys of Oklahoma from enforcing said law. (R. 1-18)

One of the plaintiffs, Ellis Carp, does business as Douglas Optical, a retail optical dispensing establishment maintained in the Zales Jewelry store, Tulsa, Oklahoma. (R. 205) Ellis Carp leases space from the

Zales Jewelry Company; and in such leased space, he maintains an optical department where he sells lenses, frames and eye glasses. (R. 216) Oran Rips, another plaintiff, is a physician who also leases space from the Zales Jewelry store in Tulsa. (R. 199) Upon such leased space he conducts eye examinations and issues prescriptions for glasses, which are generally filled by Douglas Optical at the same location. (R. 204, 217-219) Ellis Carp is also an officer in an Oklahoma corporation, Lee Optical of Oklahoma, Inc. (R. 205-206) This corporation maintains a store in Oklahoma City where lenses, frames and eye glasses are sold at retail. (R. 206) At both the Lee Optical store in Oklahoma City and the Douglas Optical department in Tulsa, glasses are dispensed and sold by means of duplicating lenses in the hands of patients without a prescription. (R. 206-207)

Trial of this case was had on October 26 and 27, 1953, before a three judge District Court. (R. 70-262) The written opinion of the District Court was filed March 1, 1954 (R. 36-68), and the judgment and decree of the District Court was filed March 29, 1954. (R. 27-29)

Under the judgment and decree of the District Court, the following portions of Section 2 of House Bill No. 953 were held unconstitutional and void, to-wit:

> "Those portions of Section 2 (Title 59, Chapter 24, Section 942), Oklahoma Statutes, which makes it unlawful for any person not a licensed optometrist or ophthamologist to fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliance to the face of a person . . .

> or to duplicate or attempt to duplicate or to place or replace into the frames, any lenses or other optical appliances which have been prescribed, fitted or adjusted for visual correction, or which are intended to aid human vision . . . except upon written prescriptive authority of an Oklahoma licensed ophthamologist or optometrist." (R. 27-38)

Portions of Sections 3 and 4 of House Bill No. 953 were also declared unconstitutional and void. (R. 27-29) The ruling of the court and the questions presented on Sections 3 and 4 are not discussed in this amicus curiae brief.

The three general groups in the field of visual care in Oklahoma are the ophthamologist (physician), the optometrist and the optician. (R. 116, 158)

The ophthamologist is a duly licensed medical doctor or physician who specializes in the care of the eyes. He may also be referred to as an oculist. The general medical practitioner, although not specializing in the care of the eyes, may also examine and treat eye diseases or visual defects; this is particularly true in the smaller communities where the specialist is not available. (R. 72, 75, 90)

The optometrist is also a professional man who is educated and trained to examine the eyes for refractive error and at the same time to recognize but not treat diseases of the eyes. (R. 72) In the event that the optometrist detects evidence of some disease of the eyes while refracting or fitting glasses, the optometrist will refer the patient to the ophthamologist or physician for appropriate medical treatmennt. (R. 79)

The third group in the field of eye care is that of the optician who is engaged in the compounding, filling and adapting of prescriptions for eye glasses. This field is generally broken down into the optical supplier or wholesaler, who actually does the fabricating and grinding of the lenses, and the optical dispenser or retailer, who cuts, edges and mounts the lenses, furnished by the optical supplier, into frames and fits and adjusts the frames to the face of the patient. The patient or the public rarely deals directly with the optical supplier but may deal directly with the optical dispenser or dispensing optician. (R. 116-118)

The optometrist generally dispenses the prescriptions, the glasses which he prescribes; whereas the ophthamologist or physician generally issues his prescription to the patient to be taken by the patient to an optical dispenser. Much of the business of the retail optical dispenser is derived from the prescriptions issued by physicians. (R. 133, 158) The retail optical dispenser is to the ophthamologist as the pharmacist is to the general medical practitioner. (R. 97)

The testimony and depositions of individuals engaged in all three fields were introduced at the trial. Among many other matters, the testimony pertained to the reasons or necessity for requiring optical dispensers or opticians to have a written prescription from a physician or optometrist before they may dispense or supply glasses to the public.

There was testimony to the effect that improperly fitted eye glasses will not cause any permanent damage to the

organic structure of the eye, but that glasses which are misfitted will result in loss of efficiency, discomfort and other irritations. (R. 233-234)

By reason of education and training and under the provisions of the Oklahoma law, the only persons who are qualified to examine or refract the eyes and to issue prescriptions are the physicians and optometrists. (R. 103, 230, 324) Optical dispensers or opticians are not trained to examine the eyes for refractive error. (R. 103, 230) In the case of a patient desiring his initial pair of glasses, he must first consult with a physician or optometrist who will examine or refract his eyes and issue a prescription therefor. (R. 102)

In the event that a patient who has already been examined and fitted with glasses desires an additional pair of glasses or has broken his glasses and needs the same replaced, several courses of action are open. The patient may return to the physician or optometrist for a re-examination. If the patient is satisfied with his glasses, however, he may return to the optical dispenser, who will dispense or supply him with glasses upon his original prescription. The patient himself may possess the prescription, the optical dispenser may have the prescription on file if he originally sold the glasses, or else the patient or the dispenser may obtain the prescription by calling the physician for the same. In the event that the patient has lost his prescription and the optical dispenser does not have the same on file and it is inconvenient or undesirable to call the physician and obtain the same, the dispenser may duplicate the

lenses by the use of mechanical instruments, principally the lensometer. (R. 99) The lensometer is a mechanical device or instrument which measures the power of the existing lens and reduces it to prescriptive terms. (R. 124-126)

The District Court held that portion of the Oklahoma statute which forbids the optical dispenser or optician to fit, adjust or adapt lenses and frames to the face of a person and to duplicate or replace into the frames any lenses, except upon prescriptive authority of a licensed physician or optometrist, is unconstitutional and void.

SUMMARY OF ARGUMENT.

Section 2 of House Bill 953 (59 Okl. Statutes, Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942), with which this amicus curiae brief is concerned, requires optical dispensers to have a written prescription from a physician or optometrist before supplying glasses to the public. The practice of the physician and optometrist being subject to state regulation under its police power in the interest of public health, safety, and welfare appears to not be in controversy.

House Bill No. 953 was designed to insure that citizens of Oklahoma shall receive best possible visual care through trained, qualified and licensed physicians and optometrists.

The State of Kansas strongly urges that the statute requiring a licensed physician's or optometrist's prescription to duplicate eye glass lenses is properly within the police power of the state and gives effect to the

licensing regulations previously enacted. Section 2 of House Bill No. 953 places the visual care of the people under the supervision and responsibility of qualified and licensed physicians and optometrists and does not deprive opticians of their right to pursue their calling or to perform their activities. This statute merely requires that they perform their activities pursuant to prescriptive authority of qualified and licensed professional men. The validity of the legislation with regard to dispensing or fitting of the initial pair of eye glasses does not appear to be questioned or disputed. Plaintiffs below seek an exemption allowing them to duplicate and dispense lenses without the necessity of obtaining a prescription.

The law is designed to protect the public health, welfare and safety and has a rational basis.

Since every presumption is indulged in favor of the validity of legislative acts, and since the practice of optometry is within the scope of the police powers of the state, the evidence in the case reveals sufficient facts upon which the legislature, on a rational basis, could properly enact the statutes in question. Although there may be debatable questions as to the reasonableness of the legislative regulation, this is not for the courts, but for the legislature which is entitled to form its own judgment.

The evidence revealed several reasons why duplication of eye glass lenses should be upon prescription rather than by obtaining necessary information through the use of a mechanical device only, such as, (a) vertex distance

may be shown by prescription; (b) correct axis of lense; (c) correct optical center of lense; (d) duplication by a mechanical device from an inadequate fragment of a lense may result in an incorrect lense; (e) dated prescription indicates time of last examination and may indicate need for another examination; (f) out of adjustment mechanical device will result in patient being supplied with incorrect lense; (g) element of human error in use of mechanical device; (h) repeated duplications from glasses alone may result in cumulative errors; (i) professional men prefer duplications from prescriptions.

These and other facts show reasonableness of the legislative requirements, and adequate reasons and a rational basis for their enactment. Thus, the actions and requirements of the legislature cannot be termed wholly illogical, arbitrary, capricious or unreasonable. Even though debatable, the legislature is entitled to its own judgment which should not be superseded by the views of the court.

Although there is a reasonable difference of opinion on the matter of duplication of eye glass lenses with or without a prescription, any doubt must be resolved in favor of the legislative judgment and the validity of the state law.

The Oklahoma legislature properly placed the care of the eyes under the supervision and responsibility of qualified and licensed professional men. This is a proper exercise of the state police power and the state law should be upheld.

ARGUMENT.

I.

PURPOSE OF LAW IS TO PLACE VISUAL CARE OF THE PUBLIC UNDER LICENSED AND QUALIFIED PROFESSIONAL PERSONS.

The Oklahoma statute considered in this amicus curiae brief regulates the sale of optical goods in Oklahoma. In general, Section 2 of House Bill No. 953 (59 O. S. Supp. 1953, Section 942; 59 Okl. St. Ann. Section 942) requires optical dispensers or opticians to have a written prescription from a physician or optometrist before they may supply glasses to the public. The District Court held that Section 2 was unconstitutional and void insofar as it would prohibit an optician from fitting, adapting or adjusting lenses, frames and eye glasses to the face by inserting old lenses into new frames and duplicating either lenses or complete eye glasses without a written prescription (or its duplicate) from a licensed physician or optometrist.

The basis for the District Court's decision as expressed in its opinion (R. 36) was that there was no real or rational relation between the public health and welfare and the provisions of Section 2 of House Bill No. 953. The opinion of the District Court is to the effect that Section 2 deprives the opticians of their right to freely pursue a lawful calling without a real and rational reason. The District Court held that the language of Section 2 made it unlawful for an optician to take old lenses and place them in new frames and then fit the completed spectacles to the face of the eye glass

wearer except upon written prescription. The court also held that the effect of Section 2 prohibits the duplication of existing lenses without a prescription.

Inasmuch as the court found that the optician could perform these particular services without the necessity of a written prescription, the court held the provisions of Section 2 to be unduly oppressive upon opticians without real or rational relation to the public health and welfare.

There appears to be no controversy about the practice of the physician or optometrist being subject to regulation by the state under its police power in the interest of public health, safety and welfare. The court acknowledged that the phase of visual care which deals with the actual examination of the eyes, whether for pathology or refraction, is clearly subject to legislative control. (R. 43)

The Oklahoma legislature had previously enacted statutes providing for the examination, registration and licensing of physicians authorizing such physicians to examine and refract eyes (Chapter 11, Title 59, Oklahoma Statutes 1951) The Oklahoma legislature had also previously enacted statutes providing for the examination, registration and licensing of optometrists (Chapter 13, Title 59, Oklahoma Statutes 1951). Recognizing the need for the protection of the public in the field of visual care, the Oklahoma legislature deemed it necessary to insure that only qualified and trained persons be permitted to examine eyes and prescribe glasses. The legislature, therefore, enacted the statutory provis-

ions relative to physicians and optometrists, which prescribes the qualifications, establishes the standards, and provides for licenses, whereby a person may be entitled to serve the public in examining eyes and prescribing glasses.

The purpose of House Bill No. 953 was to insure that the citizens of Oklahoma shall receive the best possible visual care through the efforts of well trained and qualified physicians and optometrists. As evidenced by the statute itself, it was deemed imperative by the Oklahoma legislature that the entire field of visual care be placed under the supervision of professional practitioners with all non-licensed artisans or interests, such as opticians, prohibited from activity except upon prescriptive authority.

Section 1 of House Bill No. 953 (59 O. S. Supp. 1953, Section 941; 59 Okl. St. Ann., Section 941) reads:

> "It is the public policy of the State of Oklahoma that the citizens of Oklahoma shall receive the best possible visual care, through the efforts of well trained and qualified physicians licensed under Chapter 11, Title 59, Oklahoma Statutes and optometrists licensed under Chapter 13, Title 59, Oklahoma Statutes and that no unqualified person shall be permitted to visually correct for compensation the eyes of another."

The legislature rightfully and properly enacted statutes specifying who could examine eyes, fit glasses and write prescriptions. It would indeed be an anomaly in the law for the legislature to permit only licensed individuals to examine eyes, fit glasses, and write prescrip-

tions, while at the same time permitting lenses and glasses to be dispensed and sold to the public without the necessity of such prescriptions. The purpose of the statutes relative to registration and licensing of physicians and optometrists was to insure that the public received the proper and correct lenses for their ocular defects. Nothing is gained by requiring such licenses, if the lenses and glasses which the public requires can be obtained without the necessity of a prescription from those licensed. The provisions of House Bill No. 953 were therefore enacted to give full effect to the licensing requirements. The legislature insured that glasses were obtained only upon the prescriptions of duly licensed physicians or optometrists. The legislature desired to give effect to the licensing regulations by requiring that the lenses be dispensed or sold only upon the prescription of such persons who are duly licensed by law. The legislature properly placed the visual care of the people under the supervision and responsibility of qualified and licensed physicians and optometrists.

In furtherance of this public policy, Section 2 of House Bill No. 953 makes it unlawful for any person (optician) to fit lenses, frames or eye glasses to the face or to duplicate or place into frames any lenses prescribed for visual correction, except that they may be authorized to do so by a written prescription or its duplicate.

The Oklahoma statute does not deprive the opticians of their right to pursue their calling or to perform their activities. It merely requires that they perform their activities pursuant to prescriptive authority. The ques-

tion is whether the requirement of prescriptive authority has some real or rational basis for the protection of the public health, safety or welfare.

There appears to be no dispute as to the validity of this legislation with regard to the dispensing or fitting of the initial pair of eye glasses by the optician. The optician is not qualified, trained or licensed to examine and refract eyes. The examination and refraction of eyes, in order to determine the necessity for eye glasses and the proper correction for visual defects must be done by the licensed professional practitioner, either a physician or optometrist. In the instance of the initial pair of eye glasses, the optician must, of necessity, act pursuant to prescriptive authority.

In this action plaintiffs sought the right to replace or duplicate a lens without a prescription from a licensed optometrist or physician and to fit that duplicated lens as mounted in a frame to the individual.

The prohibitions contained in Section 2 of House Bill No. 953 against dispensing, fitting or replacing lenses and glasses without a prescription would include the initial lenses or glasses obtained by the individual as a result of an initial eye examination. In other words, before an individual can obtain his first lenses or pair of glasses, he must have an examination and a prescription by a licensed practitioner. There is no prohibition against having any number of eye glasses made up from one prescription. To obtain glasses having lenses with a different correction, there must be a subsequent examination and new prescription.

The plaintiffs below seek an exemption whereby they may duplicate lenses and dispense the duplicated lenses without the necessity of obtaining a prescription.

The acts which plaintiff below desires to do in violation of the Oklahoma law is contrary to the purpose and intent of the law, which is designed to protect the public health, welfare and safety and to place the visual care of the public under the supervision and responsibility of qualified and licensed professional persons.

II.

VISUAL CARE OF PUBLIC IS WITHIN POLICE POWER AND CONSTITUTIONALITY OF STATUTE IS PRESUMED UNLESS STATUTE IS CLEARLY ARBITRARY AND CAPRICIOUS.

We could not hope to make a more applicable statement pertaining to the statute in question than Mr. Justice Cardozo made in the case of Williams vs. Baltimore, 289 U. S. 36, 41, 77 L. ed. 1015, 1021, 53 Sup. Ct. Rep. 431, where he said:

> "Furtherance of the public good is written over the face of this statute from beginning to end as its animating motive."

In scrutinizing a statute attacked as unconstitutional, a presumption of constitutionality must be indulged. It is fundamental that no statute should be declared unconstitutional unless its infringement of the superior law is clear beyond substantial doubt. Every presumption is indulged in favor of the validity of legislative acts. If there is doubt as to the constitutionality of an act, such doubt is resolved in favor of its validity.

The regulation of the practice of optometry is within the police powers of the several states, and it is believed that plaintiffs below will not contend otherwise. McNaughton vs. Johnson, 242 U. S. 344, 61 L. ed. 352, 37 Sup. Ct. Rep. 178; Roschen vs. Ward, 279 U. S. 337, 73 L. ed. 722, 49 Sup. Ct. Rep. 336. As stated by the New Jersey Supreme Court in Abelson's vs. New Jersey State Board of Optometrists, 5 N. J. 412, 75 A. 2d 867, 22 ALR 2d 929:

> "Thus, by its very nature, the practice of optometry is subject to regulation for the protection of the public against ignorance and incapacity and deception and fraud, equally with the practice of ophthalmology and the other 'learned professions', a category originally confined to theology, law and medicine, but long since broadened in keeping with the diffusion of scientific learning and the need of specialized knowledge in the functioning of our ever-expanding and complex society. New Jersey State Board of Optometrists v. S. S. Kresge Co., 113 NJL 287, 174 A 353 (Sup. Ct. 1934), affirmed 115 NJL 495, 181 A. 152 (E. & A. 1935). The Legislature recognizes optometry as a profession calling for the exercise of scientific skill. One cannot qualify for the practice of the profession unless he has been graduated from an approved school or college of optometry with the degree of doctor of optometry. RS 45:12-1, 45:12-5, NJSA.
>
> "But in the final analysis, it is the nature of the subject matter and the end to be served that determine the quality and content of the regulatory power. The public health is a paramount concern of government. Apart from the protection of the individual against incapacity and fraud, the correction of visual deficiencies bears a direct relation to the public

safety and our general social and economic well being. The relationship is self-evident. The Legislature is invested with a broad discretion in the choice of means to serve this vital public interest, subject only to constitutional restraints and the rule of reason. If the measures invoked tend to serve a legitimate interest of society, the wisdom of the course taken is not ordinarily a justiciable question. When the subject lies within the police power of the State, 'debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment.' Sproles v. Binford, 286 US 374, 52 S. Ct. 581, 585, 76 L. Ed 1167 (1932). The range of the State's discretion in promoting the security and well being of the public 'accords with the subject of its exercise.' Sterling v. Constantin, 287 US 378, 53 S. Ct. 190, 195, 77 L. Ed 375 (1932). Where the end is one to which legislative power may properly be directed, it is enough 'if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end'. Stephenson v. Binford, 287 US 251, 53 S. Ct. 181, 187, 77 L. Ed. 288, 298, 87 ALR 721 (1932). In a word the State's exercise of the police power for the protection of a valid public interest is not subject to judicial interference if the means employed are fairly adapted to that end."

Thus, it is respectfully submitted that the right to regulate in this case has been determined as being within the police power of the State of Oklahoma. Therefore, debatable questions as to reasonableness are not for the courts, but for the legislature which is entitled to form its own judgment. The subject of optometry and the practice thereof being within the scope of the state's police power, the only limitation upon the exercise of

the power are that the regulations must have reference in fact to the welfare of society and must be fairly designed to protect the public against evils which might otherwise occur. Within these limitations, the legislature is the sole judge of the nature and extent of the measures necessary to accomplish its purpose. Since the subject of optometry concerns the public health, welfare and safety, the courts will not interfere with the judgment of the law making body unless such judgment is entirely devoid of a rational basis. It is respectfully submitted that the judicial inquiry should be restricted to the issue of whether any state of facts, either known or which could be reasonably assumed, affords support for the legislative action. Even though the character or effect of a statute and the reasons upon which it is based, be debatable, the legislature is entitled to its own judgment and its judgment will not be superseded by the views of the court. It is the contention of the State of Kansas as amicus curiae that the question for determination is not whether, in the judgment of the court, the reason on which the instant statutes are based are sound, but whether they are so plainly unsound that they may confidently be characterized as unreasonable and capricious. If the statute in question has been enacted upon a basis of evils that are not arbitrary, the extent thereof should not be measured against the estimate of the legislature. Also, if on the evidence in this case, there is room for a reasonable difference of opinion—and we submit that there is—as to whether lenses and eye glasses should be dispensed, fitted, replaced or sold except upon

a prescription of a licensed professional practitioner, the judgment of the legislature as expressed in the statute may not properly be superseded. Debatable questions as to reasonableness, wisdom and propriety, even upon medical matters concerning which there is a difference of opinion, are for legislative decisions. Even though the legislation may appear unwise or inexpedient, it remains the sole duty and responsibility of the lawmaking body. Collins vs. Texas, 223 U. S. 288, 297, 56 L. ed. 439, 445.

III.

THE EVIDENCE SHOWS SUFFICIENT AND SUBSTANTIAL REASONS FOR ENACTMENT OF SECTION 2 OF HOUSE BILL No. 953.

The record in this case contains sufficient evidence revealing various facts and reasons supporting the validity of the Oklahoma statute in question. Consideration of these facts or beliefs constitute an adequate reason and a rational basis for the enactment of Section 2 of the Oklahoma statute and for a holding that the same is valid. These facts undoubtedly prompted the Oklahoma legislature in the enactment of the statute. The witnesses included physicians, optometrists and opticians.

It was acknowledged without dispute that an examination and prescription must be had in the first instance before a pair of glasses may be dispensed by the optical dispenser. (R. 102, 103, 169, 231, 272, 352)

It is further acknowledged, without dispute, that the care of the public's eyes and vision should only be had

under the supervision and responsibility of licensed professional practitioners such as opthamologists or optometrists rather than by unlicensed persons even though they be skilled artisans. (R. 102, 107, 108, 169, 229, 230, 271, 273, 283, 292, 293, 294, 344, 345, 353, 354.)

The testimony disclosed a number of reasons why duplication of eye glasses should be made pursuant to a prescription of a physician or optometrist rather than by duplication from the lenses or fragments of broken lenses through the use of mechanical instruments by unlicensed and unprofessional individuals. The testimony in the case discloses that professional men including both physicians and optometrists, together with opticians, prefer to have duplications made from prescriptions rather than from glasses alone by use of such instruments as the lensometer. (R. 106, 107, 235, 250.)

Mechanical instruments such as the lensometer are only used to determine the original prescription in the absence of such prescription. This method is employed only when a prescription, for some reason, is not available. By requiring a prescription in the first instance, the legislature precluded the possibility of errors and mistakes which the optician can make by use of a mechanical instrument. Duplication from a prescription rather than from the glasses alone eliminates error that may result from an attempt to determine the prescription by the use of a lensometer reading. (R. 105, 106, 107, 169, 170, 235, 250.)

In order to duplicate a lense by mechanical methods only, there must be an adequate or sufficient fragment

or portion remaining. Without a prescription an optician may undertake to duplicate from an inadequate fragment and thereby furnish incorrect and improperly fitted lenses to the patient, whereas, the prescription itself would furnish all the correct data for grinding and adapting the lense. (R. 106, 142, 165, 251, 348)

In certain instances the prescription of the optometrist or physician needs to and does contain certain data or information regarding the vertex distance—the distance of the lense from the eye—and the angle of the lense to the eye that must be known in order to properly adapt the eye glasses to the patient. This information and data cannot be determined from the lenses or glasses alone. (R. 92, 103, 104, 228, 237, 312, 313)

Post-operative prescriptions such as prescriptions issued following cataract operations, contain necessary data and information for adapting glasses to the patient. This data and information cannot be ascertained from the glasses alone, but only from the prescription. (R. 339)

There is evidence to the effect that a lense may rotate or turn in its frame with the result that the axis of the lense will not be in proper position when placed before the eye. As a result, duplication obtained by a lensometer reading would not conform to the doctor's prescription for the axis position of the lense. On the other hand the prescription itself will indicate the correct axis of the lense. (R. 138, 139, 165, 166, 236, 237)

A prescription will also show the correct optical center of the lense. A lense which has rotated in the frame

and which is then duplicated by means of a lensometer may not conform to the prescription for the optical center of the lense. (R. 236, 237)

A mechanical device such as a lensometer may become out of adjustment resulting in incorrect readings. If this be the case, when duplications are being made by a lensometer, the patient would be supplied with an incorrect lense which would not conform to the original prescription. (R. 170, 235, 250, 251)

The element of human error in making lensometer readings is always present. Such human error in the course of a lensometer reading to obtain the power of the lense and duplicate the prescription, may cause an incorrect or improperly fitted lense to be furnished. (R. 125, 129, 140, 141, 169, 170, 236, 250, 251)

Each and all of the above mentioned matters concerning duplication of lenses are supported by testimony in this case. These reasons are sufficient and valid for requiring a prescription before duplicating lenses and fitting glasses. These reasons cannot be termed wholly illogical, arbitrary, capricious, or unreasonable. In the face of such reasons, supported by evidence, it cannot be said that there is no conceivable reason for a legislative act which requires that lenses be duplicated only upon a prescription of a licensed physician or optometrist.

It is not contended that the question is without possible dispute or difference of opinion. But, even though debatable, the legislature is entitled to its own judgment and such judgment should not be superseded by the views of the court. As stated by Mr. Chief Justice

Hughes in Sproles vs. Binford, 286 U. S. 374, 388, 389, 76 L. ed. 1167, 1179, 52 Sup. Ct. Rep. 581:

> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the court, but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."

It is respectfully submitted that the statute which prohibits duplication of eye glasses solely by the use of a mechanical instrument in the hands of an unlicensed person is not so entirely void of a rational basis that the court must interfere. The court should not concern itself with the wisdom of the legislative policy. Based upon the evidence in this case, there is, at least, a reasonable difference of opinion on the matter of duplication with or without a prescription. Any doubt must be resolved in favor of the legislative judgment and the validity of the act.

The rule is stated in Williams vs. Baltimore, 289 U. S. 36, 42, 77 L. ed. 1015, 1022, 53 Sup. Ct. Rep. 431 as follows:

> "The judicial function is exhausted with the discovery that the relation between means and end is not wholly vain and fanciful, an illusory pretense. Within the field where men of reason may reasonably differ, the legislature must have its way."

The following is found in the opinion in the case of Graves vs. Minnesota, 272 U. S. 425, 428, 71 L. ed. 331, 335, 47 Sup. Ct. Rep. 122:

"By enacting the present statute, the State has determined, through its legislative body, that to safeguard properly the public health, it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. And the case is to be considered in the light of the principle that the state is primarily the judge of regulations required in the interest of public safety and welfare, and its police statutes may only be declared unconstitutional where they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest."

Taken as a whole, the several sections of the Oklahoma statute provide in substance that eye glasses shall only be dispensed and sold pursuant to the prescription of duly licensed physicians and optometrists. The Oklahoma legislature believed that the care of the eyes of the public should be entrusted to and be the responsibility of qualified, licensed professional men. Judicial support by this court in support of this proposition is found in the case of Roschen vs. Ward, Attorney General of the State of New York, 279 U. S. 337, 72 L. ed. 722. That case involved a New York law which made it unlawful to sell at retail any eye glasses or lenses for the correction of vision unless a duly licensed physician or optometrist was in charge and in personal attendance where such articles were sold. This Court upheld the New York law as a valid enactment under the police power of the state.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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